No. 89-672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH UNIVERSAL & TRIUMPHANT, INC., AND ELIZABETH CLARE PROPHET,

Petitioners,

—v.—

LINDA WITT, Executrix of the Estate of Gregory Mull,

Respondent.

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

Counsel for Petitioners

January 2, 1990

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

Respondent's opposition to the petition for a writ of certiorari fails to respond to the important constitutional questions raised by this case. Instead, respondent attempts to obfuscate these issues by focusing exclusively on limited aspects of the case presented to the jury, and ignores (or twists beyond recognition) the wholesale assault before the jury on petitioners' religious beliefs and practices. At the same time, however, respondent admits that his fraud claim is inextricably intertwined with his "coercive persuasion" theory, and that his emotional distress claim relied on petitioners' verbally labelling Gregory Mull the "Beast of Blasphemy."

1. Respondent would have this Court believe that the jury imposed liability upon petitioners solely because petitioners "engaged in a fraudulent land scheme." Respondent's Brief at 9 ("Resp. Br."). However, the evidence of fraud allegedly perpetrated upon Mull in his performance of architectural services for the Church formed only a small part of respondent's case.[1] Respondent cannot now change the fact that much of his evidence and argument focused on the Church's religious practices, particularly the central religious practice of "decreeing," the three-month seminar at Summit University in 1975 (four years before the fraud allegedly perpetrated on Mull), and infliction of emotional distress through verbal threats of religious retribution. Petition at 7-11 ("Pet."). Given respondent's substantial emphasis at trial on evidence of religious practices and statements as the basis for liability, any claim that the ver-

---

1 As noted in the Petition, at 3 n.3, virtually all the material facts were seriously disputed. Petitioners emphasize, however, that this Court need not resolve any factual disputes to resolve the constitutional questions squarely presented by this case, and petitioners expressly do not ask the Court to do so. Nevertheless, petitioners cannot help but comment upon respondent's remarkable distortion of the record, certain instances of which are discussed, *infra*, where relevant to the issues before this Court.

dict was based solely on the alleged secular fraud is pure distortion.

Respondent asserts that petitioners cannot argue that a land fraud scheme is part of their religion, and of course, petitioners do not do so. Petitioners have never argued that religious organizations cannot be held liable for *secular* frauds and other torts, and if respondent had so limited his evidence, this case would be in a substantially different posture. But evidence of non-religious fraudulent conduct formed only a small part of respondent's case.

Indeed, respondent's attempt to pretend that this case rested solely on an alleged fraud unrelated to religious practices is belied by respondent's own admission that liability was necessarily predicated on petitioners' alleged use of "coercive persuasion" against respondent to obtain "all of his time and money." Resp. Br. at 39; *see ibid.* at 3, 8, 9, 25. This concession is crucial to understanding the theory of the case presented by respondent at trial: the evidence of "coercive persuasion" was absolutely essential to the fraud claim, in that it purported to explain how Mull could have been fraudulently induced to provide architectural services once his will had been overborne through religious "indoctrination".

The "coercive persuasion" alleged here involved peaceful voluntary religious practices. No amount of hyperbole can alter the fact that no evidence exists to support respondent's assertion that the Church engaged in practices that were "physical torture, war-like and involuntary." Resp. Br. at 9. Indeed, respondent's own recitation of these practices shows them to be common religious practices. To accept respondent's categorization of these activities would remove constitutional protection from a wide range of religious practices of numerous religions.

Thus, respondent argues that during two three-month periods at Summit University in 1975 and 1977, he undertook a vegetarian diet, fasting, colonics and enemas, along with decreeing, lecturing, and that he suffered a lack of sleep.[2] These

---

2 There is no evidence that "petitioners changed respondent's diet to one consisting exclusively of raw vegetables and frequent fasting." Resp. Br.

activities constituted "coercive persuasion" and resulted in Mull becoming petitioners' "slave." Respondent omits the fact that Mull also testified that he "learned a new religion" (R.T.91), and that the Church's control over him was accomplished in part by "the teachings themselves" because he "liked the teachings" and "believed in the teachings" (R.T. 270-71). Pet. at 3-4. Moreover, Mull's undisputed testimony is that he *voluntarily* entered these seminars to learn the Church's teachings and to have his questions about God answered (R.T. 84-88). Similarly, respondent relies heavily on the testimony of his counsel's wife that Mull was hypnotized by the religious practices of the Church, including a religious confessional ceremony and the central religious practice of decreeing.[3] There is, however, not a shred of evidence that Mull was *physically* coerced into engaging in any of these religiously-motivated activities, which are common religious practices not only of this Church, but of many other religions. Pet. at 8 n.12.[4]

---

at 9. Except for the two three-month seminars at Summit University in 1975 and 1977, Mull controlled his own diet (R.T. 271-74). Pet. at 4. While at Summit University, Mull testified to a vegetarian diet, including whole grain dishes and bakery products, beans and legumes, milk, cheese, fruits, and juices (R.T. 283-84). There is no testimony that Mull ever had a diet exclusively of "raw vegetables."

Respondent also relies upon highly inflammatory testimony from a third party about a "salute" that was purportedly Nazi-like. Resp. Br. at 11 n.4. Mull, however, never testified that he witnessed such a salute or that he considered any Church ceremony or ritual to be Nazi-like or terrorizing.

3 Mull never testified that he ever participated in a ceremony or activity such as described by respondent, Resp. Br. at 10 n.3, and which respondent claims was "a purely secular act of hypnosis and shock induction." This description is merely based on a hypothetical question presented to counsel's wife (R.T. 1219 to 1219-1). In fact, Mull testified only to a "ceremony" in which he believed "all the things . . . put into [his] confession . . . were gone forever" (R.T. 106), not a "direct confrontation . . . wherein Prophet goes into a screaming tirade," Resp. Br. at 10 n.3. In any event, even in the hypothetical there is nothing about a "screaming tirade" or a "direct confrontation." Moreover, respondent is simply incorrect that petitioners withdrew their objection to testimony based upon this hypothetical question.

4 Thus, Mull's "thought reform experts" testified that he was subjected to "a systematic manipulation of social and psychological influence

In the absence of physical threats or violence, the claim of "coercive persuasion" and "hypnotism" as a basis for tort liability against a religious organization for its religious practices raises profound First Amendment questions. This theory of liability is antithetical to the very concept of free will and individual rights embedded in the religion and free speech clauses of the First Amendment. Pet. at 21-24; *see, e.g., NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). Indeed, respondent's only defense of his coercive persuasion theory is that the religious conduct voluntarily entered into by Mull is not deserving of First Amendment protection because it purportedly resulted in Mull's loss of his free will. The First Amendment, however, does not permit judges or juries to evaluate which religions and which peaceful religious activities have resulted in an individual's loss of free will, for the reasons stated in the Petition, at 21-24.

2. Respondent further pretends that this case does not present the constitutional question whether tort liability may be imposed for religious speech and peaceful religious practices that a jury determines to be "outrageous." Yet respondent concedes that the claim for intentional infliction of emotional distress was based, at least in part, on Mrs. Francis allegedly labelling Mull the "Beast of Blasphemy." Resp. Br. at 36. Indeed, respondent repeatedly emphasized that he had suffered extreme emotional distress after he was called the Beast of Blasphemy. Pet. at 5, 6, 10, 16. And, in his opening argument to the jury, respondent explicitly placed this alleged threat in religious terms: "And [Mull's] *biblical* training and his *religious* training taught him to believe that the beast and the serpent were evil to be sought out and destroyed." Pet. at 6; R.T. 53-54 (emphasis added).[5]

---

techniques" (R.T. 1281), and that Mull's "addiction" to petitioners' religion was accomplished by "routinized behavior" such as "chanting or meditating or studying or group activities" (R.T. 1125). No one, including Mull, testified to *any* physical coercion or threats.

5 There are *no* allegations or evidence that any actions were taken by anyone connected to the Church against Mull following his being labeled the

Respondent's half-hearted assertion that he did not seek damages based on threats of divine retribution and other religiously-motivated speech, Resp. Br. at 46, is simply false, as the record makes clear. *See* 6a; Pet. at 5, 10, 16 & n.20. Moreover, respondent claims that his "case did not rest *solely*, or even *primarily*, on threats of divine retribution," Resp. Br. at 46 (emphasis added), thereby conceding that liability *may* have been based, at least in part, upon such threats.

Respondent instead contends that under *Molko* v. *Holy Spirit Assn.*, 46 Cal.3d 1092, 252 Cal. Rptr. 122, 762 P.2d 46 (1988), *cert. denied*, 109 S.Ct. 2110 (1989), liability may be imposed for threats of divine retribution. However, in *Molko*, the state Supreme Court explicitly held that threats of "divine retribution" *cannot* state a claim for intentional infliction of emotional distress. *Molko*, 46 Cal.3d at 1120, 1123-24.

Respondent simply cannot avoid the fact that this case was tried, at least in substantial part, on the theory that threats of divine retribution and other religious speech were "outrageous," the necessary predicate for liability under a claim of intentional infliction of emotional distress. For the reasons stated in the Petition, such a claim violates fundamental First Amendment principles. Pet. at 15-21.

3. Respondent misrepresents Question 3 of the Petition in an attempt to avoid the consequences of his improper assault at trial on petitioners' religious beliefs and practices. Petitioners questioned whether, under *United States* v. *Ballard*, 322 U.S. 78 (1944), the First Amendment prevents a party from inflaming a jury against a church's unusual and unorthodox religious beliefs and practices through ridicule and denigration and by attempting to instill fear and hatred against the religion and its practices.

Respondent ignores this question, and instead asks "whether counsel may question, during argument to the jury, the *sincerity* of the purported religious beliefs of leaders of a defendant church," Resp. Br. at 12 (emphasis added). The problem for

---

Beast of Blasphemy, other than allegations that Church members decreed "against" Mull.

respondent, however, is that the sincerity question was not presented at trial and is not raised by this petition. At no time in the trial court did the respondent seek to put into issue the question of the sincerity or good faith of the petitioners' professed beliefs, nor did he ask the trial court to instruct the jury on that question. By contrast, in *Ballard*, upon which respondent so heavily relies, the trial court explicity instructed the jury that defendants could be convicted only if the jury found that they did not themselves believe the religious representations they made. 322 U.S. at 81-82.[6] Respondent cannot now pretend that this case turned on the issue of religious sincerity.

Moreover, the purpose of respondent's evidence and argument is clear: respondent did not directly challenge the *sincerity* of petitioners' religious beliefs, but rather *ridiculed* and *denigrated* those beliefs. Thus, when respondent asked if Mr. Francis was the reincarnation of Captain Cook, the point was not to question the sincerity of the belief, but rather to ridicule him for having that belief. Similarly, the incessant questioning of witnesses, including the defendants, about decreeing, was aimed not at the sincerity of the beliefs in the effectiveness of decreeing, but rather to mock and to denigrate this practice, and also to convince the jury that decreeing was a "bad" practice designed to "control" people. The other instances of attacks on religious beliefs and practices set forth in the Petition were also unrelated to the sincerity of petitioners' beliefs. Pet. at 8-11, 25-27.[7]

---

6 This Court did not hold in *Ballard* that a jury could inquire into the sincerity of religious beliefs. It held only that the district court was correct "when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents." 322 U.S. at 88. This Court remanded on all other issues, including presumably the "sincerity" issue, which the defendants had raised. While on remand the Ninth Circuit permitted the jury to consider the defendant's sincerity, *Ballard* v. *United States*, 152 F.2d 941 (9th Cir. 1945), this Court never dispositively reached this issue, as it ultimately reversed the Ballard's convictions on wholly unrelated grounds. *Ballard* v. *United States*, 329 U.S. 187 (1946) (exclusion of women from grand jury panel mandates reversal of conviction).

7 Respondent ignores most of the instances of ridicule raised by petitioners, and instead refers to testimony of Randall King, Mrs. Francis'

Indeed, if the "sincerity" question is deemed to be present in the record of this case, that is further reason why certiorari should be granted. While the question of whether and under what circumstances a jury may determine the sincerity of the religious beliefs of a church or its members has not been determined by this Court, the Court has strongly suggested that such an inquiry in a case such as this would run afoul of the First Amendment. *See Braunfeld* v. *Brown*, 366 U.S. 599, 609 (1961) ("a state conducted inquiry into the sincerity of the individual's religious beliefs . . . would itself run afoul of the spirit of constitutionally protected religious guarantees"); *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963) ("It is highly doubtful whether such evidence [of bad faith religious claims] would be sufficient to warrant a substantial infringement of religious liberties"); *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("the very process of inquiry" into "the good faith of the position asserted by the clergy-administrators . . . may infringe on rights guaranteed by the Religion Clauses"); *Thomas* v. *Review Board*, 450 U.S. 707 (1981).[8]

Particularly in the context of a civil tort trial before a jury, inquiry into the sincerity of belief inevitably becomes indistinguishable from inquiry into truth or falsity of belief. Where the former inquiry is permitted, the jury will be invited or tempted to draw conclusions on sincerity of belief based upon its own subjective determination of the reasonableness or believability

---

former husband, who was suing Mrs. Francis and the Church at the time of the trial, in an attempt to show that respondent presented evidence of Mrs. Francis' insincerity. However, Mr. King's testimony was wholly separate from the instances raised in the Petition, at 8-11, 25-27, of ridicule and scorn heaped upon petitioners' religious beliefs and practices, and the critical point remains that respondent never asked the jury to consider Mrs. Francis' lack of sincerity as a basis for liability.

8 The only cases permitting an inquiry into sincerity concern claims of conscientious objection to military service, where sincerity is a statutory requirement. *See, e.g., United States* v. *Seeger*, 380 U.S. 163 (1965). In those cases, the compelling governmental interest in raising an army and providing for the national defense has been held to justify a limited inquiry into the sincerity with which an individual holds a specific belief objecting to military service. *Cf. United States* v. *O'Brien*, 391 U.S. 367 (1968).

of religious doctrine. Indeed, if sincerity of belief was at issue in the trial below, the point is made in the very record of this case. According to respondent, the ridiculing of the religious beliefs of Mr. and Mrs. Francis was justified precisely to show that their professed beliefs were insincere. But it would blink reality to determine that the jury did not first decide that the beliefs themselves were unworthy of belief, even if the jury had been properly instructed on the sincerity inquiry, which it was not. Thus, to permit juries to strip churches and their members of the protection of the religion clauses based upon determinations of "sincerity of belief" would undermine *Ballard*'s necessary principle that juries may not determine truth or falsity of religious belief. It was precisely in recognition of this ineluctable fact that Justice Jackson dissented from the *Ballard* Court's refusal to decide the sincerity issue and to remand on that and other questions.

> I do not see how we can separate an issue as to what is believed from considerations as to what is believable . . . . If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. . . . When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.

322 U.S. at 92-93 (Jackson, J., dissenting).

The "sincerity" claim has been used in most of the numerous recent religious tort cases, referred to in the Petition, to inflame juries against unorthodox religious groups and beliefs and as a back door method to permit juries to reject religious beliefs as untrue. To the extent that respondent is correct that sincerity of belief is raised in the record of this case, certiorari should be granted on the question as well, so that, in the words of Justice Jackson, the Court may "have done with this business of judicially examining other people's faiths." *Id.* at 95.

4. Respondent also argues that his closing argument was not improperly prejudicial, an issue not raised by petitioners before this Court. Petitioners' recitation of statements in respondent's closing argument, Pet. at 10-11, was not intended to show that the argument was prejudicial, but rather to demonstrate that the case was tried and argued to the jury upon constitutionally impermissible theories, including threats of divine retribution, ridicule of religious beliefs, and coercive persuasion. Again, respondent cannot hide from his reliance upon these impermissible theories by attempting to focus attention now on the alleged secular fraud.[9]

5. Respondent completely ignores petitioners' argument, based on a long line of cases extending over half a century that

> when a jury's general verdict *may* have rested upon grounds improper for First Amendment reasons, a reviewing court will not pause to speculate whether the jury's verdict was actually reached on other, and permissible grounds.

Founding Church of Scientology v. *United States*, 409 F.2d 1146, 1164 (D.C. Cir.) (emphasis original); *cert. denied*, 396 U.S. 963 (1969); *see Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *Claiborne Hardware*, *supra*, 458 U.S. at 917-18; Pet. at 28-29.

Instead, respondent irrelevantly argues that reversal is not required when a court refuses a request for a special verdict, Resp. Br. at 16-17, 48-49, a state law issue that petitioners never raised before this Court. In response to issues actually raised in the Petition, respondent argues only that the harmless error rule of *Chapman* v. *California*, 386 U.S. 18, 24 (1967), should not apply to civil cases for the obviously incorrect reason that individual liberty is not at stake in such cases, and confusingly

---

9 Respondent misstates that petitioners argued that respondent attacked the validity of their religious beliefs by arguing that "petitioners were not in the 'business' of religion but were in the business of 'raising money and not building'." Resp. Br. at 43. Petitioners, however, never made any such claim; rather, the assault on religion involved the ridicule of the practice of decreeing, the comparisons with Nazis, the attacks on Mrs. Francis' spiritual leadership claims, and ridicule of such beliefs as reincarnation.

claims that the argument to the jury was not prejudicial under *Chapman*. Resp. Br. at 18-19.

Never, however, does respondent challenge the principle that *if* the verdict may have rested on constitutionally impermissible grounds, the verdict must be reversed. Indeed, respondent's own heading, Resp. Br. at 46, concedes that the verdict may have rested on the impermissible ground of threats of divine retribution. *See*, *supra*, at 5.

CONCLUSION

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

Dated: New York, New York
January 2, 1990

Respectfully submitted,

ERIC M. LIEBERMAN
Counsel of Record
DAVID B. GOLDSTEIN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

Counsel for Petitioners